UNITED STATES

v.

ROBERT C. LeFAIVRE ET AL.

IBLA 93-353 Decided January 30, 1997

Appeal from a decision of Administrative Law Judge Ramon M. Child declaring the Flow Lava No. 1 placer mining claim (WMC 233531) null and void. WYW 114256.

Affirmed.

1. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Common Varieties of Minerals: Unique Property--Mining Claims: Locatability of Minerals: Generally

In order to establish that a deposit of building stone is an uncommon variety locatable under the Act of July 23, 1955, 30 U.S.C. § 611 (1994), the mineral deposit must be compared with other deposits of such minerals generally; the mineral deposit at issue must possess a unique property; the unique property must give the deposit a distinct and special value; if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and the distinct and special value must be reflected by the higher price which the mineral commands in the market or in the reduced cost of production or overhead resulting in greater profit. The distinct and special value of the mineral deposit must derive from a unique property inherent in the deposit itself and not from extrinsic factors such as proximity to other claims owned by the claimant, and must be based on the value of the deposit as it is found on the claims rather than on any enhanced value which might be obtained for a manufactured or marketed product of the deposit.

2. Administrative Procedure: Adjudication--Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Contests--Rules of Practice: Government Contests--Rules of Practice: Hearings

When the Government contests a mining claim alleging that the claim is invalid because it was located for a common variety mineral, the Government must presentsufficient evidence to establish a prima facie case that the mineral deposit does not possess a unique property giving it a distinct and special value. When the Government's prima facie case has been made, the burden shifts to the contestee to overcome this showing by a preponderance of the evidence.

APPEARANCES: Robert C. LeFaivre, Rock Springs, Wyoming, pro se, for appellants; Glenn F. Tiedt, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Robert C. LeFaivre, et al. (referred to collectively as LeFaivre), 1/ has appealed from a decision of Administrative Law Judge Ramon M. Child, dated April 1, 1993, declaring the Flow Lava No. 1 placer mining claim (WMC 233531) null and void on the ground that it did not contain a locatable mineral deposit under section 3 of the Act of July 23, 1955 (Common Varieties Act), 30 U.S.C. § 611 (1994).

LeFaivre located the Flow Lava No. 1 placer mining claim, which embraces 160 acres described as the NW¼ sec. 18, T. 21 N., R. 101 W., sixth principal meridian, Sweetwater County, Wyoming, on March 27, 1987. 2/

1/ The notice of appeal lists Robert C. LeFaivre, Jean M. LeFaivre, Julie A. Knutson, Alexiea S. Knutson, James J.F. Knutson, James A. Knutson, and R. Mark LeFaivre, as contestees in this proceeding. The contest complaint also named Shari J. LeFaivre as an owner of the claim. In the answer to the complaint, Robert C. LeFaivre, who signed the answer as "Locator[,] Trustee of Family Group/Associates Trust," and has appeared as the sole representative of the contestees throughout these proceedings, denied that Shari J. LeFaivre had any viable interest in the Flow Lava No. 1 claim or that she continued to participate in the "Family Association of Locators" mineral entry development. Thus, although the appealed decision identifies Shari J. LeFaivre as a contestee, she is not a party to this appeal.

2/ LeFaivre originally located a claim covering the same land on Jan. 2, 1981. That claim (WMC 210250) was declared abandoned and void for failure to file an affidavit of annual assessment work or notice of intention to hold the claim for the 1982-83 and 1983-84 assessment years. See Robert C. LeFaivre, 95 IBLA 26 (1986).

The claim lies within the boundaries of the Natural Corrals Area of Critical Environmental Concern on land which was withdrawn from mineral entry on December 9, 1988.

The Wyoming State Office, Bureau of Land Management (BLM), initiated this proceeding on September 12, 1990, by filing a contest complaint
charging that no discovery of a valuable mineral had been made within the boundaries of the Flow Lava No. 1 placer mining claim because the mineral present was not actually or prospectively marketable and seeking a declaration that the claim was, therefore, null and void. LeFaivre answered the complaint, contending, inter alia, that he had discovered a valuable deposit of an uncommon variety of building stone on the claim.

Judge Child held a hearing on BLM's contest complaint on November 5, 1991, in Green River, Wyoming. BLM called two BLM employees as witnesses: Randall Keith Porter, the Green River Resource Area geologist who had conducted the validity examination of the Flow Lava No. 1 placer claim, and Dennis Ray Stenger, the Assistant District Manager for Mineral Resources of the Rock Springs District Office who had also participated in the validity examination of the claim. Both of these employees testified that, in their opinion, the stone found on the claim was not a locatable mineral because it was not an uncommon variety of building stone. BLM also introduced 11 exhibits, including the mineral report prepared after the validity examination (Gov. Exh. 3), and various photographs of the claim and surrounding area.

LeFaivre testified on his own behalf and called two additional witnesses: Ray E. Harris, a geologist employed by the Wyoming Geological Survey, who considered the rock found on the claim to be unique, and Mark Moxley, the District Supervisor of the Wyoming Department of Environmental Quality (DEQ), Land Quality Division, who testified with respect to the State proceedings which resulted in the denial of LeFaivre's application to amend his mining permit to allow mining on the Flow Lava No. 1 claim. LeFaivre also offered 2 samples of rock found on the claim and 10 other exhibits, 2 of which the Judge refused to receive into evidence. Both parties filed post-hearing findings of fact, conclusions of law, and briefs in support of their respective positions.

In his decision, Judge Child framed the sole issue in the proceeding as whether the lava stone found on the Flow Lava No. 1 placer mining claim possessed a property giving it a distinct and special value which made it a locatable mineral under the Common Varieties Act, 30 U.S.C. § 611 (1994). After reviewing the evidence concerning the uniqueness of the stone, the Judge concluded that, although there was evidence that similar types of rock were found in more accessible areas of the adjacent Zirkel Mesa, a preponderance of the evidence established that the claim contained building stone with unique chemical properties and weathering characteristics.

Notwithstanding this conclusion, however, Judge Child also found that little or no evidence had been presented to show that these or any other unique properties or characteristics gave the deposit a distinct and

special value. In so doing, the Judge rejected LeFaivre's contention that the deposit's distinct and special value derived in part from its close proximity to other claims owned by LeFaivre, observing that if such value existed, it stemmed not from a unique, inherent property of the deposit, but rather from a factor extrinsic to the deposit which was irrelevant to the determination of whether the unique properties of the deposit gave it a distinct and special value.

Judge Child similarly discounted LeFaivre's assertion that the stone would be extremely valuable after it had been subjected to an undisclosed "innovative" manufacturing process, noting that, for purposes of determining whether or not a building stone possessed a special and distinct value so as to render the deposit subject to location, the value of the deposit could not depend on value added by manufacture but must be determined by the marketability of the stone in its rough form. Since not only did BLM's evidence establish that the stone from the claim would not command a higher price than stone of the same general type, but LeFaivre also conceded that it would be uneconomical for him to attempt to sell the stone in its rough form, Judge Child concluded that the deposit's unique chemical properties and weathering characteristics did not endow the deposit with a distinct and special value for building stone purposes. Accordingly, the Judge declared the Flow Lava No. 1 placer mining claim null and void because the stone disclosed thereon was not a locatable mineral under the mining laws.

In his combined notice of appeal and statement of reasons for appeal (SOR), LeFaivre insists that the Judge's determination that the deposit on the claim contained uncommon stone with unique properties necessarily compels a finding that the Flow Lava No. 1 placer mining claim is a properly located claim. While LeFaivre contends that his ability to demonstrate the prospective marketability of the stone has been thwarted by the Wyoming DEQ's denial of his permit amendment application which sought approval of his mining plan for removing stone from the claim, he nevertheless asserts that, in light of the stone's inherent uncommon properties, the deposit's strategic position, and his innovative manufacturing process (which he considers a trade secret immune from disclosure to the Government), he will realize an unusual profit from the sale of the stone in the immediate market areas. LeFaivre claims that, not only do the physical qualities of the stone and the deposit's proximity to market evidence the stone's ability to command a much higher unit value than ordinary stone used for the same purpose, but his "innovative means" results in an overhead cost reduction, further enhancing the stone's value. Thus, LeFaivre submits that he has sufficiently demonstrated that the Flow Lava No. 1 claim contains a deposit of an uncommon variety of rock. 3/

3/ LeFaivre has requested that an additional hearing be held in this case due to the long delay between the hearing and the Judge's issuance of his decision and the intervening legislation enacted by Congress requiring payment of claim maintenance fees. A second hearing will not be afforded if the claimant was given notice and an opportunity to appear at a hearing, actually was present at the hearing, and has submitted nothing which suggests that another hearing would produce a different result. Mehaffey v. OSM, 117 IBLA 350, 357 (1991); United States v. Holder, 100 IBLA 146, 148-

In its answer, BLM concedes that the rock within the Flow Lava No. 1 placer mining claim is an uncommon variety of stone due to its unique chemical properties and weathered appearance, but contends that neither the visual nor the chemical composition of the mineral gives it a distinct and special value in the marketplace as building stone. BLM characterizes the issue in this case as not whether the rock is an uncommon variety of rock, but rather whether the rock's uncommon characteristics give the deposit a distinct and special value. BLM discounts LeFaivre's speculation that the product he intends to manufacture using the stone would generate unusually high profits, arguing that the distinct and special value necessary to support LeFaivre's claim may not depend on the alleged market value of an undisclosed manufactured product. BLM stresses that, not only has LeFaivre offered no evidence that the stone found on the claim would generate greater profits or that the stone's intrinsic qualities would distinguish it from any other building stone devoted for the same intended use, but he also has admitted that it would be uneconomical for him to attempt to mine and market the rock without subjecting the stone to his assertedly innovative manufacturing process. LeFaivre's other arguments, BLM suggests, are irrelevant to the issues controlling this appeal.

In his reply, 4/ LeFaivre repeats his contention that the Judge's conclusion and BLM's acknowledgement that the stone found on the Flow Lava No. 1 placer mining claim contains an uncommon variety of rock mandates a finding that the stone is a locatable mineral. Although LeFaivre complains that his ability to demonstrate the stone's marketability has been thwarted by a BLM-instigated denial of his application to obtain a permit to mine the claim, he maintains that the unique rock's existence in the immediate market area coupled with its special use in his innovative manufacturing process and lower production costs impart a distinct and special value to the deposit. LeFaivre insists that the "[v]alue of the finished product of

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fn. 3 (continued)
49 (1987). Since LeFaivre has failed to demonstrate that the hearing in this case should be reopened, we deny his request for an additional hearing. We also reject LeFaivre's allegation in his SOR that Judge Child's decision demonstrated that the Judge was biased against LeFaivre. A charge of bias against an Administrative Law Judge will not be sustained unless a substantial showing of personal animus has been made. See United States v. Crawford, 109 IBLA 264, 266 (1989); United States v. Jones, 67 IBLA 225, 230 (1982). LeFaivre's unsubstantiated allegations of bias fall far short of the requisite showing. See United States v. Fisher, 115 IBLA 277, 281 (1990).

4/ LeFaivre's reply addresses the issues raised in both this appeal and his appeal of a decision invalidating eight mill sites located by him (IBLA 93-387). Our discussion will address only those arguments related to this appeal.

manufacture from quarry is an inherent factor of the source of the rock" (Reply at 10), thus challenging the Judge's conclusion that the deposit's value derives solely from the value of the rock in its rough form. 5/

In response, BLM asserts that LeFaivre's contention that he would be able to prove that the building stone in the Flow Lava No. 1 claim has a distinct and special value if he were allowed to use that stone to manufacture an undisclosed product falls far short of demonstrating compliance with 30 U.S.C. § 611 (1994). Even if LeFaivre could demonstrate that his undisclosed product had an extraordinary value in the marketplace, BLM maintains that this would not prove that the deposit had a distinct and special value absent evidence that the identical product manufactured with different building stone would have a significantly lesser value. In any event, BLM argues that the value any product manufactured from the raw materials from the claim is independent of and extrinsic to the value of the raw materials themselves and may not be used to determine whether a valuable mineral discovery has been made since the unique properties giving the deposit a distinct and special value must be inherent in the stone itself. Similarly, BLM maintains that the deposit's proximity to the manufacturing site is an extrinsic and thus irrelevant factor in determining the value of the deposit. BLM further contends that LeFaivre has failed to show that the lava rock found on the claim has any value at all for use as building stone. BLM also disputes LeFaivre's contention that the DEQ's denial of his permit application inhibited his ability to demonstrate the marketability of his stone, observing that marketability does not depend on actual development.

5/ LeFaivre raises numerous other issues in both his SOR and his reply. For example, he questions BLM's motive in bringing this contest, its interference with his absolute right to mine the claim, and Judge Child's denial of his request, made at the hearing, to abandon the hearing and turn the issues over to another court. See Tr. at 71-72. The motivation of a Government agency in initiating a contest against a mining claim is irrelevant. United States v. Mineco, 127 IBLA 181, 191 (1993), and cases cited. Furthermore, as against the United States, a mining claimant acquires no vested rights by the mere location of a mining claim absent a showing that the claim is supported by the discovery of a valuable mineral deposit. Until patent has been issued, not only are the claimant's rights circumscribed by the statutes and regulations under which those rights are acquired and maintained, but the United States, as the paramount title holder, may regulate the claimant's mining activities on Federal lands to protect the surface resources. Id., and cases cited. We also find no error in the Judge's refusal to curtail these proceedings, especially since LeFaivre retains the right to obtain court review of our decision. LeFaivre's many additional arguments are either totally meritless or irrelevant to the issues raised in this appeal and will not be addressed further.

[1] As is apparent from the foregoing, the sole issue in this appeal is whether the Flow Lava No. 1 placer mining claim contains a deposit of building stone locatable under the mining laws. Under the Building Stone Act, Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1994), lands chiefly valuable for building stone and not otherwise withdrawn or reserved were subject to location as placer mining claims. See generally United States v. Haskins, 59 IBLA 1, 88 I.D. 925 (1981). While the Building Stone Act was originally perceived as applicable only to common varieties of building stone (see United States v. Haskins, supra at 42-43 n.26, 88 I.D. at 946 n.26), the subsequent adoption of section 3 of the Surface Resources Act in 1955, 30 U.S.C. § 611 (1994), together with the decision of the Supreme Court in United States v. Coleman, 390 U.S. 599, 607 (1968), resulted in a limitation of the applicability of the Building Stone Act to locations of uncommon varieties of building stone which had some property giving it a distinct and special value. See also McClarty v. Secretary of the Interior, 408 F.2d 907, 908 (9th Cir. 1969).

The definitive guidelines for distinguishing common from uncommon varieties of minerals are set forth in McClarty v. Secretary of the Interior, supra. Therein, the Court opined:

> (1) [T]here must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

Id. at 908. The Court further indicated that the special economic value of the stone might also be reflected by reduced costs or overhead generating greater profits where the retail market price of the stone remains competitive with other building stone. Id. at 909; see also United States v. Henri (On Judicial Remand), 104 IBLA 93, 96-97 and n.3.

Thus, in order to qualify as a locatable deposit under the Common Varieties Act, a deposit must meet two criteria: the deposit must have a unique property and the unique property must impart to the deposit a distinct and special value. See United States v. Thomas, 90 IBLA 255, 257 (1986); United States v. U.S. Minerals Development Corp., 75 I.D. 127, 134 (1968). In this case, Judge Child found, and BLM acknowledges, that the building stone situated on the Flow Lava No. 1 claim possesses unique chemical and weathering properties. The existence of these unique properties, however, is insufficient, by itself, to render a deposit locatable; rather, the evidence must also demonstrate that these unique properties bestow upon the deposit a distinct and special value. See, e.g., United States v. Fisher, 115 IBLA 277, 286 (1990).

It is not contended before the Board that the stone from the Flow Lava No. 1 claim has any use beyond those uses to which ordinary building stone is put. The controversy before us, therefore, centers on whether the deposit's unique properties give it a distinct and special value for use as building stone as reflected either by the higher price which the stone commands in the marketplace or by reduced costs and overhead substantially increasing the profits realized from the sale of the stone at competitive prices.

The determination of whether the deposit has a distinct and special value must be grounded on the inherent, unique qualities of the deposit and not on extraneous factors such as the claim's advantageous location. See United States v. Henri (On Judicial Remand), supra at 98-99, and cases cited. Nor may a finding that a deposit has a distinct and special value be predicated on the value of a fabricated or marketed product of that deposit. McClarty v. Secretary of the Interior, supra at 909; see also United States v. Stevens, 14 IBLA 380, 391, 81 I.D. 83, 87 (1973). Rather, it is the value of the deposit as it is found on the claim that is controlling. Id.

[2] When the Government contests a mining claim alleging that the claim is invalid because it was located for a common variety mineral, the Government must present sufficient evidence to establish a prima facie case that the mineral deposit does not possess a unique property giving it a distinct and special value. See United States v. Multiple Use, Inc., 120 IBLA 63, 82 (1991); see also United States v. Mineco, 127 IBLA 181, 187 (1993). Once the Government has presented a prima facie case, the burden shifts to the contestee to overcome this showing by a preponderance of the evidence. 6/ Id.

As noted above, BLM introduced the testimony of two BLM employees who had examined the claim, as well as the mineral report prepared after that validity examination. Porter, a BLM geologist, testified that, based on his examination of the claim, he concluded that the claim did not contain locatable mineral of unique value because there was no evidence that the building stone deposit on the claim was more valuable than other stone of the same general type (Tr. at 25-26). Similarly, Stenger, the Assistant

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6/ The Department has, through its decisional law, assigned the Government the burden of going forward to establish a prima facie case (the burden of production), while at the same time recognizing that, consistent with Court decisions such as Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959), it is the mining claimant who is the actual proponent of the rule that the claim is valid, and, therefore, it is the mining claimant who bears the ultimate burden of persuasion (burden of proof). See, e.g., United States v. Knoblock, 131 IBLA 48, 81, 101 I.D. 123, 140-41 (1994), and cases cited. We view this procedure as entirely consistent with the Supreme Court's recent decision in Director, OWCP v. Greenwich Collieries, 114 S. Ct. 2251 (1994).

Rock Springs District Manager, opined that the chemical composition of the rock on the Flow Lava No. 1 claim did not contribute any unique value to the rock for the use as building stone (Tr. at 56). Although LeFaivre has attempted to discredit the testimony of these witnesses because they were BLM employees, such employees are not disqualified nor is their credibility undermined merely because of their status as BLM employees. United States v. Stevens, supra at 386, 81 I.D. at 85. Rather, testimony provided by BLM employees is subject to the same consideration and evaluation as that proferred by any other individual, including the mineral claimant, and such weight is accorded to it as the trier of fact deems warranted. Clearly, Judge Child found this testimony to be credible in his evaluation of the evidence.

The mineral report generated by the validity examination (Gov. Exh. 3) documented the results of BLM's marketing investigation which involved contacting various stone companies both telephonically and personally with samples of the rock from the claim to elicit opinions concerning the value of that rock. This marketing study revealed that the Flow Lava No. 1 rock not only would not command a higher price, but might actually be worth less than other building stone in the region, and that the deposit was at an economic disadvantage compared to other building stones locally available (Gov. Exh. 3 at 6-9). We find this evidence more than sufficient to establish the Government's prima facie case and shift the burden of preponderation to LeFaivre.

LeFaivre conceded at the hearing that the stone from the Flow Lava No. 1 claim was uneconomical unless he used it in his own innovative way (Tr. at 133) and that, unless he could utilize the rock in his intended manner in conjunction with what he already had, it was useless to him (Tr. at 134). He further acknowledged on cross-examination that the value of the unique stone depended on two factors: the manner in which he intended to use the rock and the deposit's proximity to his other claims (Tr. at 139-40). Thus LeFaivre explicitly based the distinct and special value of the Flow Lava No. 1 building stone deposit on factors extrinsic to the claim (Tr. at 140).

Although LeFaivre argues that the value of a product manufactured from the stone on the claim necessarily reflects the intrinsic value of the deposit, the distinct and special value of a deposit of building stone may not be predicated on extrinsic factors, such as the proximity of the deposit to other claims, or on the value of fabricated products. See McClarty v. Secretary of the Interior, supra. Since LeFaivre has offered no evidence concerning the value of the stone on his claim other than his speculative opinion of the value of the products to be manufactured from the stone, we find that he has completely failed to overcome BLM's prima facie case. See United States v. Thomas, supra at 262. Accordingly, we conclude that the unique properties of the Flow Lava No. 1 deposit do not furnish that deposit with the distinct and special value necessary to render that building stone locatable under the Common Varieties Act, 30 U.S.C. § 611 (1994).

To the extent not specifically addressed herein, the other arguments raised in LeFaivre's appeal have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Administrative Law Judge Child's decision is affirmed.

James L. Burski
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge